

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  QWEST CORPORATION	DOCKET NO. RPU-01-10
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**ORDER DOCKETING RENEWED PRICE REGULATION PLAN  
AND SETTING BRIEFING SCHEDULE**

(Issued November 30, 2001)

**PROCEDURAL BACKGROUND**

The Utilities Board (Board) approved a price regulation plan for U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), effective November 7, 1998. The plan was to last for three years and was approved pursuant to the provisions of Iowa Code § 476.97, specifically subparagraphs (3)"a"(5) and (6). Under the approved plan, Qwest has an option to renew the plan for one additional term of up to three years upon written notice to the Board at least 90 days prior to the expiration date of the plan. Qwest also has the option of submitting a new plan for Board approval.

On August 8, 2001, Qwest filed written notice to renew the original price regulation plan for an additional three years. The original renewed plan would then become effective on November 7, 2001, the anniversary date of the original plan.

On November 6, 2001, Qwest filed a "Renewed Price Regulation Plan" that it had negotiated with the Consumer Advocate Division of the Department of Justice

(Consumer Advocate). (This proposed renewed plan will be referred to as the "Modified Plan"). In the Modified Plan, Qwest has made certain changes to the original language, some merely updates and some substantial changes to the terms of the original plan.

Additionally, the original plan is currently on judicial review to interpret language concerning the correct gross domestic product price index (GDPPI) to use for calculating the inflation rate and whether the plan prohibits selected price decreases to accomplish a required decrease under the plan. The petition for judicial review was filed by Consumer Advocate after the Board found that the original plan was ambiguous and interpreted the plan to allow the use of the GDPPI from the federal website, which was available after the printed version, and found that the statute and original plan allowed selected decreases of basic communications services (BCS) prices to accomplish a required decrease.

Iowa Code § 476.97(2) states that the Board may approve, modify, or reject a proposed price regulation plan after notice and an opportunity for hearing and gives the Board 90 days to make a decision whether to accept, modify, or reject a plan. The Board finds that the Modified Plan raises serious legal questions that need to be addressed by the parties before the plan can be approved, modified, or rejected. The Board will therefore establish a briefing schedule for the parties to submit briefs on the legal issues as discussed in this order.

## LEGAL ISSUES

1. The most significant change made to the original plan is the addition of part III.G. that reads as follows:

III.G. Decreases Due to Competition. Qwest can decrease any BCS rate in a particular exchange or exchanges to a level which exceeds cost to respond to competition. Under no circumstances will an exchange-by-exchange rate reduction for a BCS service result in increases in BCS rates for other exchanges nor shall it reduce the amount of reduction otherwise applicable for other exchanges. Any decreases in BCS rates on an exchange-by-exchange basis may be used to offset any annual inflation-less-productivity offset decreases which would otherwise be applicable for a given exchange.

The reason given for including this new language in the Modified Plan is that it was approved for Frontier Communications of Iowa, Inc. (Frontier), in a renewed price regulation plan in Docket No. RPU-00-4.<sup>1</sup>

The language appears to allow Qwest to reduce BCS prices in many individual exchanges at any time. The Board is concerned that this provision may, on its face, violate the pro-competitive statutory policy set out in Iowa Code § 476.95(2), may be unreasonably discriminatory in violation of Iowa Code § 476.5, and may be de facto deregulation of BCS prices contrary to the requirements for deregulation in Iowa Code § 476.1D.

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<sup>1</sup> If it is determined in this docket that this provision is unlawful, the Board may revisit the issue in the Frontier plan.

2. A second legal issue concerns the language in part III.C. of the Modified Plan. The Modified Plan changes the language from the original plan that specified which GDPPI should be used to calculate the inflation rate. The original plan in part III.D. stated that the GDPPI used to calculate the inflation rate used for determining whether Qwest could increase or decrease its BCS prices was to be taken from "the most recently available monthly edition of the U.S. Department Of Commerce's Survey of Current Business, Table 7.1." The Board, in Docket No. TF-00-250 (RPU-98-4), found this language required the use of the most recent available information of economic indicators, whether from a printed or electronic format, for determining whether Qwest would be required to adjust its BCS prices. The Board found that information from the Department of Commerce's website was the most recently available GDPPI prior to the November 7, 1999, anniversary date of the plan. Consumer Advocate took the position, and has taken the position on judicial review, that the GDPPI has to come from the printed version of the Survey of Current Business and cannot come from the website.

Part III.C.1 of the Modified Plan requires that the calculation of the inflation rate use the 2nd quarter values of the GDPPI found in September edition of the Survey of Current Business. This requirement is contrary to the Board's decision in TF-00-250 and may be inconsistent with the intent of the statute. As the Board stated in TF-00-250, the intent of the statute is that increases or decreases in BCS prices should track as closely as possible the most recently available economic

conditions. By requiring the use of the printed September Survey of Current Business, the Modified Plan does not use the most current GDPPI. The September printed edition of the Survey of Current Business will have the August GDPPI values and will have only the "advance" values for the 2nd quarter. This will make the GDPPI values significantly out of date and subject to change prior to November 7, 2001.

The Board pointed out the problem with using data just a month old in the TF-00-250 order. The Board noted that in 1999 the Department of Commerce changed the base year from 1992 to 1996 between the September GDPPI sent to the printer on October 13, 1999, and the October GDPPI published on the website on October 29, 1999. The Board found that using the September GDPPI in the printed version of the Survey of Current Business would result in an inflation rate based upon outdated data. The Modified Plan now proposes to use GDPPI values that are two months old, which is contrary to the Board's decision in TF-00-250 and perhaps the intent of the statute.

3. The Modified Plan does not change the language that the Board interpreted to allow selected decreases of BCS prices to accomplish a required decrease. Part III.D of the Modified Plan concerning when and how Qwest may decrease BCS prices contains the same provisions that are in the original plan. These are the provisions that Consumer Advocate argues on judicial review require across-the-board decreases and the provisions that the Board found in TF-00-250

allowed selected decreases. If the plan is modified, either this ambiguous language should be clarified, or language should be added that the final unappealable decision on judicial review shall determine its meaning.

### **QUESTIONS**

In their briefs the parties should address the following questions as well as present any other legal arguments that are relevant to the review of the Modified Plan.

1. Does the language in part III.C.1 of the Modified Plan, filed on November 6, 2001, meet the requirements of the statute for calculating the inflation rate?
2. Does part III.G violate the pro-competitive policy established by Iowa Code § 476.95(2)?
3. Does part III.G violate the provisions of Iowa Code § 476.1D by allowing the reduction of selected basic communications services rates in individual exchanges without a finding by the Board that the service is subject to effective competition and that market forces are sufficient to ensure just and reasonable rates?
4. Does part III.G violate the statutory prohibition in Iowa Code § 476.5 against unreasonable discrimination in prices by a rate-regulated telecommunications utility?

5. Are the phrase "level which exceeds cost" and the term "competition" so ambiguous as to make them legally unenforceable?

### **PROCEDURE**

The briefing schedule established by the Board is designed to allow the Board to issue an order within the 90 days provided for the consideration of price regulation plans. The Board's order must be issued by February 4, 2002. If the parties believe that there are relevant factual considerations that need to be addressed by an evidentiary hearing, they should propose a schedule that allows for Board consideration of those issues after a hearing and that allows for sufficient time for the Board to issue a decision. If Qwest determines it would prefer to continue to be regulated under the renewal of the original price regulation plan filed August 8, 2001, rather than litigate the terms of the Modified Plan, it should make the appropriate filing with the Board.

### **ORDERING CLAUSES**

#### **IT IS THEREFORE ORDERED:**

1. On or before December 31, 2001, the parties shall file one round of simultaneous briefs that address the questions set out in the order and any other relevant legal issues. This deadline is subject to change depending upon filings under ordering clause 2.

2. On or before December 10, 2001, any party believing that there are relevant factual issues that require a hearing shall request a hearing and shall provide a proposed procedural schedule for prefiled testimony and an evidentiary hearing to be held on or before January 9, 2002.

**UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

Dated at Des Moines, Iowa, this 30th day of November, 2001.